

<p style="text-align: right;">518</p> <p>1 relationship to AWP, subject to my being 2 able to confirm that via deposition. 3 It is also my understanding 4 under the HCFA maximum allowable cost as 5 cited here is related to one of the 6 definition, of whether it is FUL or MAC. 7 The -- the HCFA or the -- the 8 HCFA price that is being referred to here 9 I would need to confirm whether that is 10 indeed the federal upper limit as 11 described in footnote 55 of attachment D, 12 which is section 4 of attachment D, and 13 for those purposes, MAC or the federal 14 upper limit essentially is a formulaic 15 percent of published price in the Blue 16 Book, in Medispan, or in the Red Book, and 17 it is of the least costly generic 18 substitute. 19 Now they talk about relating 20 that to a price, a list price, in one of 21 those books, in one of those price 22 compendia. It is unclear to me as I read</p>	<p style="text-align: right;">520</p> <p>1 they've reimbursed at a rate related to 2 AWP. So if there are potential class 3 members who can demonstrate that AWP did 4 not enter into a calculation of 5 reimbursement rate, it is my understanding 6 that they're not in the class. 7 Q. The only way that you can determine that 8 is by asking them? Is that correct? 9 A. The way that I would understand one would 10 determine that is that at the time of 11 claims administration when one would come 12 forward and they could not demonstrate 13 that they were part of the class, they 14 would not be able to submit a claim or 15 recover a claim under the litigation. 16 Q. Exactly what would you have to do during 17 this allocation exercise to determine 18 whether a particular class member has been 19 damaged? 20 A. During the damage phase of the analysis, I 21 expect to receive claims data from -- from 22 a variety of third-party payers, from a</p>
<p style="text-align: right;">519</p> <p>1 it whether it was AWP or WAC, but if it is 2 either, again there will be a formulaic 3 relationship to AWP. 4 So that in any of those cases, 5 once I have estimated my but-for AWP based 6 on the yardsticks, I will have a but-for 7 WAC and a but-for baseline as reported in 8 the list prices, and I will assess how 9 that would be counted into a MAC that is 10 formulaic related to an AWP but just to 11 the but-for AWP. 12 Q. What if the customer testifies that its 13 particular MAC list is not formulaically 14 related to an AWP? Where are you at that 15 point? 16 A. Well, if -- 17 MR. SOBOL: Objection to form. 18 You may answer. 19 A. Well, as we have discussed and as you have 20 explored in the definition of the class, a 21 third-party payer or an individual is a 22 member of either of these classes if</p>	<p style="text-align: right;">521</p> <p>1 selected, stratified sample of retailers 2 that will summarize claims across all 3 third-party payers, and based on that 4 claims information, I will be able to see 5 what reimbursements were relative to AWP, 6 relative to the but-for AWP, relative to 7 ASP, and I will be able to determine 8 whether that relationship differed by 9 different groups of third-party payers 10 such as large third-party payers who own 11 their own PBM and their own mail order, 12 such as Cigna and Aetna, relative to 13 third-party payers, such as the Blues, 14 that do not. This is precisely the type 15 of analysis that I have done with claims 16 data in damage calculations and going 17 toward allocation analysis in Hatch-Waxman 18 matters. 19 Q. So when a particular class member comes in 20 to perfect its damage claim, the first 21 thing you are going to have to do is 22 figure out all the ASPs for all the drugs</p>

52 (Pages 522 to 525)

<p style="text-align: right;">522</p> <p>1 that it bought? Right?</p> <p>2 A. That -- not necessarily. It's -- it -- to</p> <p>3 the extent that the number can be</p> <p>4 generalized to a percentage on total</p> <p>5 reimbursements by type of end payer, it</p> <p>6 will be made as simple as possible or as</p> <p>7 detailed as is necessary to be reasonably</p> <p>8 accurate and equitable.</p> <p>9 Q. Or you are going to have to determine an</p> <p>10 expectation yardstick for all of the drugs</p> <p>11 that a particular customer bought?</p> <p>12 Correct?</p> <p>13 A. No.</p> <p>14 Q. Okay. So you don't need an expectation</p> <p>15 yardstick in order to determine the extent</p> <p>16 to which a particular customer or a</p> <p>17 particular class member has been damaged?</p> <p>18 A. The yardsticks are calculated for the</p> <p>19 groups of drugs as defined and as we've</p> <p>20 discussed, and I will always choose the</p> <p>21 yardstick that is most conservative, and</p> <p>22 that will be the yardstick for that class</p>	<p style="text-align: right;">524</p> <p>1 A. The -- the allocation subject to the</p> <p>2 analysis, which I have yet to do -- as I</p> <p>3 say, I have done these in the past, and</p> <p>4 sometimes they can turn out to be very</p> <p>5 simple -- but depending on what the</p> <p>6 statistical analysis shows, it is possible</p> <p>7 or likely that there will be a</p> <p>8 proportional overcharge by perhaps types</p> <p>9 of drugs or just by type of end payer.</p> <p>10 Q. Well, don't you have to have a customer's</p> <p>11 contract --</p> <p>12 MR. SOBOL: I am sorry.</p> <p>13 Q. -- to determine if it specifically</p> <p>14 references AWP?</p> <p>15 MR. SOBOL: He was trying to say</p> <p>16 something.</p> <p>17 Had you finished your answer?</p> <p>18 THE WITNESS: What?</p> <p>19 MR. SOBOL: Had you finished</p> <p>20 your answer?</p> <p>21 THE WITNESS: I don't know. You</p> <p>22 guys got into it. I got --</p>
<p style="text-align: right;">523</p> <p>1 of drugs. There will not be a separate</p> <p>2 yardstick by NDC or by customer.</p> <p>3 Q. Right. But there will be a yardstick for</p> <p>4 that customer?</p> <p>5 A. There will be an amount that that customer</p> <p>6 reimbursed or paid, and there will be a</p> <p>7 percentage overcharge on that</p> <p>8 reimbursement.</p> <p>9 Q. Well, first you have to have the</p> <p>10 yardstick? Right?</p> <p>11 MR. SOBOL: Objection.</p> <p>12 A. The marketwide yardstick.</p> <p>13 Q. Well, that's the way you propose to do it;</p> <p>14 right?</p> <p>15 A. That's --</p> <p>16 MR. SOBOL: Objection.</p> <p>17 A. -- what I thought I was testifying -- I am</p> <p>18 testifying to my proposal here.</p> <p>19 Q. And then you have to have the individual</p> <p>20 customer's contract; right?</p> <p>21 MR. SOBOL: Objection to the</p> <p>22 form.</p>	<p style="text-align: right;">525</p> <p>1 MR. EDWARDS: Go ahead, Tom. I</p> <p>2 want to reask my question anyhow. Go</p> <p>3 ahead and make your objection.</p> <p>4 MR. SOBOL: I just want to make</p> <p>5 sure he has a chance to finish answering</p> <p>6 these questions. That's all, Steve.</p> <p>7 BY MR. EDWARDS:</p> <p>8 Q. Don't you have to look at the contract of</p> <p>9 each customer to determine whether it</p> <p>10 expressly references AWP?</p> <p>11 MR. SOBOL: Objection.</p> <p>12 A. I would assume -- and in terms of claims</p> <p>13 management, it is not something I'm an</p> <p>14 expert on -- but that would be how someone</p> <p>15 qualifies as being a class member, and</p> <p>16 what they need to show, it will be</p> <p>17 determined by something other than what</p> <p>18 I've been asked to do.</p> <p>19 I have been asked to assume that</p> <p>20 for those who were subject to an AWP</p> <p>21 pricing regime, to come up with methods</p> <p>22 for calculating what the overcharge was,</p>

<p style="text-align: right;">526</p> <p>1 and -- and to do it most appropriately as</p> <p>2 a percentage overcharge, and so how --</p> <p>3 when the class member comes forward, I'm</p> <p>4 going to assume that whoever does that</p> <p>5 kind of -- designs that kind of threshold</p> <p>6 or that kind of determination will have</p> <p>7 made that determination, and what will be</p> <p>8 put before me are dollars of amounts of</p> <p>9 drugs reimbursed under AWP.</p> <p>10 Q. So you think all of those determinations</p> <p>11 are going to be made during the liability</p> <p>12 phase of the case?</p> <p>13 MR. SOBOL: Objection.</p> <p>14 A. No.</p> <p>15 Q. Well, when are they going to be made?</p> <p>16 MR. SOBOL: Objection.</p> <p>17 A. The -- you are asking me legal questions.</p> <p>18 The -- my understanding of a matter of</p> <p>19 this sort is is there a classwide impact,</p> <p>20 and was there injury, and are there</p> <p>21 formulaic methodologies for getting at</p> <p>22 aggregate classwide damages, and are there</p>	<p style="text-align: right;">528</p> <p>1 appropriate allocations.</p> <p>2 Q. One of the things you are going to need to</p> <p>3 do is if the customer's contract has MAC</p> <p>4 pricing for generics or certain brands,</p> <p>5 you are going to have to determine how</p> <p>6 that MAC pricing worked? Correct?</p> <p>7 MR. SOBOL: Objection to the</p> <p>8 form.</p> <p>9 A. To the extent that MAC pricing or any</p> <p>10 discounts off of AWP are reflected in</p> <p>11 reimbursement rates relative to existing</p> <p>12 AWP's, I'll need to document that with --</p> <p>13 through statistical methods to then relate</p> <p>14 what those discounts would be relative to</p> <p>15 but-for AWP's or any other list price</p> <p>16 related to AWP if it happens to be the</p> <p>17 baseline price or WAC.</p> <p>18 Q. And just to make sure --</p> <p>19 MR. SOBOL: Let's take the</p> <p>20 afternoon break now. Okay?</p> <p>21 Q. -- I understand your testimony --</p> <p>22 MR. SOBOL: This emergency has</p>
<p style="text-align: right;">527</p> <p>1 methods, formulaic methods, that can deal</p> <p>2 with assisting counsel in allocating</p> <p>3 aggregate damages to class members.</p> <p>4 Q. Well, the --</p> <p>5 A. And that's -- that's what I've done, and</p> <p>6 my conclusion is in the affirmative. My</p> <p>7 understanding of normal proceedings -- but</p> <p>8 that may -- that may be based on antitrust</p> <p>9 litigation, and not on RICO litigation --</p> <p>10 is that there is a liability phase where I</p> <p>11 have been asked to assume these</p> <p>12 allegations occurred. I assume the trier</p> <p>13 of fact has to see some facts about this</p> <p>14 and things. But I don't know that. I am</p> <p>15 merely conjecturing from what my</p> <p>16 understanding of the progress is. And if</p> <p>17 liability is found and class is certified,</p> <p>18 then I will be asked to actually calculate</p> <p>19 damages, and once I have calculated</p> <p>20 damages, it will be at that stage while I</p> <p>21 am doing so that I will start to put in</p> <p>22 place the methodologies to do the</p>	<p style="text-align: right;">529</p> <p>1 arisen again. Okay? Thank you.</p> <p>2 (Recess taken at 3:07 p.m.)</p> <p>3 (Recess ended at 3:23 p.m.)</p> <p>4 BY MR. EDWARDS:</p> <p>5 Q. I would like to talk to you a little bit</p> <p>6 about physician-administered drugs in the</p> <p>7 private sector. Okay?</p> <p>8 A. Okay.</p> <p>9 Q. You deal with that in your declaration; is</p> <p>10 that correct?</p> <p>11 A. I certainly deal with physician-</p> <p>12 administered drugs. That's correct.</p> <p>13 Q. You deal with physician-administered drugs</p> <p>14 in the public sector as well as the</p> <p>15 private sector? Correct?</p> <p>16 A. And by that you mean the fact that I have</p> <p>17 different yardsticks therefor? Is that</p> <p>18 what you mean by dealing with them?</p> <p>19 Q. Well, that is one way to look at it.</p> <p>20 A. That is correct.</p> <p>21 Q. You base your opinion that causation can</p> <p>22 be demonstrated on a classwide basis for</p>

54 (Pages 530 to 533)

<p style="text-align: right;">530</p> <p>1 physician-administered drugs in the</p> <p>2 private sector on the Med. PAC study; is</p> <p>3 that correct?</p> <p>4 MR. SOBOL: Objection to form.</p> <p>5 A. I base my conclusions about impact on the</p> <p>6 allegations I have been directed to</p> <p>7 assume, and the fact that they as a result</p> <p>8 of those allegations imply that the</p> <p>9 standard benchmark price for all products</p> <p>10 sold, subject to public or private</p> <p>11 reimbursement, are related to AWP.</p> <p>12 Q. And you rely on the Med. PAC study? Is</p> <p>13 that correct?</p> <p>14 A. Well, I do rely on that in part, yes.</p> <p>15 Q. Look at attachment D, paragraph 30,</p> <p>16 page 11.</p> <p>17 (Witness complying.)</p> <p>18 Q. I am sorry. Page 10.</p> <p>19 (Witness complying.)</p> <p>20 A. Okay.</p> <p>21 Q. You state beginning in paragraph 29, "A</p> <p>22 variety of evidentiary materials</p>	<p style="text-align: right;">532</p> <p>1 forward in my declaration.</p> <p>2 Q. Have you read the entire study?</p> <p>3 MR. SOBOL: I object to the</p> <p>4 form.</p> <p>5 A. I do not recall. I read -- I certainly</p> <p>6 read the chapter on Medicare-related</p> <p>7 reimbursement or Medicare Part B drug or</p> <p>8 reimbursement by private sector -- let me</p> <p>9 step back.</p> <p>10 I read the chapter related to</p> <p>11 reimbursement for physician-administered</p> <p>12 drugs, chapter 9 thereof, is my</p> <p>13 recollection, most closely.</p> <p>14 Q. And the study refers to a survey. Have</p> <p>15 you talked to the people who did the</p> <p>16 survey?</p> <p>17 A. I didn't talk to the people. I think I</p> <p>18 have seen a copy of the survey. And let's</p> <p>19 see whether I have cited that in the</p> <p>20 documents relied on.</p> <p>21 (Pause.)</p> <p>22 (The witness viewing documents.)</p>
<p style="text-align: right;">531</p> <p>1 demonstrate that private sector third-</p> <p>2 party payers negotiate reimbursement rates</p> <p>3 for both physician-administered and oral</p> <p>4 pharmaceuticals based on AWP or</p> <p>5 equivalently WAC. For example, the</p> <p>6 Medicare Payment Advisory Commission, Med.</p> <p>7 PAC, contracted with Dyckman & Associates</p> <p>8 in 2002 to conduct a survey of private</p> <p>9 health plans regarding their payments for</p> <p>10 physician-administered drugs."</p> <p>11 Have you read that study in its</p> <p>12 entirety?</p> <p>13 A. I am sorry. I got distracted. Now you</p> <p>14 were reading from paragraph 30 or from</p> <p>15 footnote 39?</p> <p>16 Q. I was reading from paragraph 30.</p> <p>17 A. And you just read that paragraph to me?</p> <p>18 Q. Yes.</p> <p>19 A. Okay. It went on longer than I thought I</p> <p>20 had written it.</p> <p>21 I certainly have relied on that</p> <p>22 study as one source for the opinions put</p>	<p style="text-align: right;">533</p> <p>1 A. I guess I have not cited it, unless it is</p> <p>2 not listed under Dyckman but another. Oh,</p> <p>3 yes -- oh, no, it is not listed.</p> <p>4 The -- I don't remember who --</p> <p>5 Dyckman did that for a group that --</p> <p>6 perhaps Ms. Halpern could help us out</p> <p>7 here.</p> <p>8 THE WITNESS: Do you know who</p> <p>9 Dyckman --</p> <p>10 MR. EDWARDS: I don't think that</p> <p>11 is a permissible --</p> <p>12 THE WITNESS: Question?</p> <p>13 MR. EDWARDS: -- question.</p> <p>14 THE WITNESS: I wanted to help</p> <p>15 you out.</p> <p>16 BY MR. EDWARDS:</p> <p>17 Q. I just asked you a very simple question,</p> <p>18 which is whether you have ever talked to</p> <p>19 the people who did the survey.</p> <p>20 A. Did I call them up and talk to them? No.</p> <p>21 Q. You never talked to them about how they</p> <p>22 did the survey?</p>

<p style="text-align: right;">534</p> <p>1 MR. SOBOL: Objection.</p> <p>2 A. I reviewed the summary in the Med. PAC</p> <p>3 report, and it is my recollection I got a</p> <p>4 copy of the Dyckman report that may be</p> <p>5 listed here. Because it was conducted by</p> <p>6 a group, that it might be listed under</p> <p>7 that name, but I didn't go so far as to</p> <p>8 critically interview any of the</p> <p>9 participants in the actual survey</p> <p>10 research.</p> <p>11 Q. And you are in no position at this point</p> <p>12 to testify as to the reliability of the</p> <p>13 survey? Isn't that true?</p> <p>14 MR. SOBOL: Objection.</p> <p>15 A. The description and its appearance in the</p> <p>16 Med. PAC report suggests to me that it is</p> <p>17 reliable. It is a report to Congress. It</p> <p>18 is not the journal of irreproducible</p> <p>19 results. So I -- there is certain</p> <p>20 gravitas in the -- where it has appeared</p> <p>21 that would lead me to think that it wasn't</p> <p>22 done by, you know, three undergraduates on</p>	<p style="text-align: right;">536</p> <p>1 Q. Do you know anything about how physicians</p> <p>2 are reimbursed for injectables in the</p> <p>3 private sector?</p> <p>4 A. I have seen claims on the part of</p> <p>5 oncologists for a particular</p> <p>6 physician-administered drug to public and</p> <p>7 private sector insurers.</p> <p>8 Q. That's in the Lupron case?</p> <p>9 A. That's correct.</p> <p>10 Q. Other than that, do you have any knowledge</p> <p>11 of how physicians are reimbursed for</p> <p>12 injectables --</p> <p>13 MR. SOBOL: Objection.</p> <p>14 Q. -- in the private sector?</p> <p>15 MR. SOBOL: Objection.</p> <p>16 A. And incidentally what I observed in the</p> <p>17 Lupron case accorded precisely with this</p> <p>18 -- with the Dyckman results.</p> <p>19 Have I looked at other -- have I</p> <p>20 done the kind of work that I have looked</p> <p>21 at actual claims data by physicians</p> <p>22 submitted to third-party payers? That is</p>
<p style="text-align: right;">535</p> <p>1 a street corner or something.</p> <p>2 Q. What are you going to do if it turns out</p> <p>3 that it is not reliable?</p> <p>4 MR. SOBOL: Objection.</p> <p>5 A. Well, I think it is pretty clear how the</p> <p>6 class is defined. That if it cannot be</p> <p>7 demonstrated, and as I will look more</p> <p>8 closely during the damage analysis, that</p> <p>9 AWP does not enter into reimbursements for</p> <p>10 a particular group, if what you are trying</p> <p>11 to say is that the surveyed third-party</p> <p>12 payers about which he, Dyckman, is</p> <p>13 reporting survey results were befuddled,</p> <p>14 confused, or the survey was</p> <p>15 inappropriately designed, well then it</p> <p>16 would be unreliable.</p> <p>17 It appeared in a report that</p> <p>18 would be subject to a certain amount of</p> <p>19 peer review that made me think that it had</p> <p>20 been vetted to enough of an extent that I</p> <p>21 could rely on the quote that I have put</p> <p>22 forward here.</p>	<p style="text-align: right;">537</p> <p>1 part of the sample that I have asked to</p> <p>2 see as I have asked to see samples of</p> <p>3 other groups to see exactly what those</p> <p>4 claims submissions are and for both a</p> <p>5 calculation of damages but also to assess</p> <p>6 whether they are related to AWP.</p> <p>7 Q. Have you looked at any such claims data</p> <p>8 with respect to the drugs at issue in this</p> <p>9 case?</p> <p>10 MR. SOBOL: Objection.</p> <p>11 A. I have -- I have asked for those</p> <p>12 depositions to be noticed, and they have</p> <p>13 yet to be noticed as far as I know.</p> <p>14 Q. Have you looked at any contracts between</p> <p>15 physicians and third-party payers with</p> <p>16 respect to physician-administered drugs?</p> <p>17 A. I don't recall.</p> <p>18 Q. Do you know whether coverage for</p> <p>19 physician-administered drugs is part of</p> <p>20 the medical benefit?</p> <p>21 A. In some cases, it can be.</p> <p>22 Q. And in other cases?</p>

56 (Pages 538 to 541)

<p style="text-align: right;">538</p> <p>1 A. I mean it is either going to be under the</p> <p>2 pharmacy benefit or the medical benefit.</p> <p>3 Q. But you don't know which?</p> <p>4 A. I think generally --</p> <p>5 MR. SOBOL: Objection.</p> <p>6 A. I have yet to fully ascertain that, but my</p> <p>7 understanding to date is that it is</p> <p>8 usually under a medical benefit.</p> <p>9 Q. Do you have any understanding as to how</p> <p>10 third-party payers go about negotiating</p> <p>11 contracts with physicians and other</p> <p>12 providers for physician-administered</p> <p>13 drugs?</p> <p>14 A. That is a subject to be fleshed out during</p> <p>15 the damage analysis.</p> <p>16 Q. Do you know whether insurance companies</p> <p>17 and other third-party payers negotiate</p> <p>18 with physicians for the reimbursement rate</p> <p>19 that they're going to pay for the services</p> <p>20 as well as the drug?</p> <p>21 A. I do understand that.</p> <p>22 Q. Okay. Do you know anything about the</p>	<p style="text-align: right;">540</p> <p>1 reimbursement rates would have been had</p> <p>2 the AWP scheme not been put in place.</p> <p>3 Q. And if there are trade-offs, will that</p> <p>4 have an impact on your opinion?</p> <p>5 A. Which opinion?</p> <p>6 Q. Your opinion that you can determine</p> <p>7 whether there is classwide impact in</p> <p>8 connection with physician-administered</p> <p>9 drugs in the private sector.</p> <p>10 MR. SOBOL: Objection.</p> <p>11 A. No.</p> <p>12 Q. Do you have any understanding of the</p> <p>13 extent to which third-party payers in that</p> <p>14 particular sector have knowledge of the</p> <p>15 spread?</p> <p>16 MR. SOBOL: Objection.</p> <p>17 A. My information is anecdotal at best, and</p> <p>18 that is related to the Lupron matter.</p> <p>19 Q. Did it ever occur to you that insurance</p> <p>20 companies have a pretty good handle on the</p> <p>21 spread and that they agree to base</p> <p>22 reimbursement on AWP so they can avoid the</p>
<p style="text-align: right;">539</p> <p>1 trade-offs between the two?</p> <p>2 A. Well, I know that, and it is my</p> <p>3 understanding, that in a negotiation</p> <p>4 process they negotiate reimbursement for</p> <p>5 services, and they negotiate reimbursement</p> <p>6 for the drugs that are administered during</p> <p>7 as part of those services.</p> <p>8 Q. And do you know whether there are</p> <p>9 trade-offs between those two elements?</p> <p>10 A. Well, as my direction from counsel at this</p> <p>11 point has been to focus on the fraud</p> <p>12 constituted by the pharmaceutical aspects</p> <p>13 of any mix of that grouping of payments,</p> <p>14 and I have not been asked to focus on</p> <p>15 whether the fraud slipped over, could have</p> <p>16 been traded off in other ways.</p> <p>17 Q. So you are assuming for now that there are</p> <p>18 no trade-offs between the rate for the</p> <p>19 services and the rate for the drugs in the</p> <p>20 negotiation process?</p> <p>21 A. For now, I'm taking as given what has been</p> <p>22 negotiated, and I'm looking at what the</p>	<p style="text-align: right;">541</p> <p>1 transaction cost of a prolonged</p> <p>2 negotiation over the service?</p> <p>3 MR. SOBOL: Objection to form.</p> <p>4 A. I understand that negotiations go -- or I</p> <p>5 would -- well, I would assume negotiations</p> <p>6 go on between third-party payers and</p> <p>7 oncologists, let's say, or whoever the</p> <p>8 particular specialty is for the</p> <p>9 physician-administered drug in the same</p> <p>10 way that negotiations go on as we have</p> <p>11 looked at proforma contracts before, and I</p> <p>12 would assume a number of things enter into</p> <p>13 them, and it is my understanding and the</p> <p>14 data that I have seen in Lupron indicates</p> <p>15 that there is a relationship of those</p> <p>16 price -- of the reimbursement rates to</p> <p>17 AWP, and I have -- I have focused on that</p> <p>18 aspect of the negotiations or the results</p> <p>19 of the negotiations as they appeared in</p> <p>20 what was paid relative to AWP.</p> <p>21 Q. Is it your understanding that each</p> <p>22 negotiation is potentially unique?</p>

<p style="text-align: right;">542</p> <p>1 MR. SOBOL: Objection to form.</p> <p>2 A. The -- the unique -- I guess I am not</p> <p>3 quite sure what you mean about -- by</p> <p>4 "unique." That each particular -- you are</p> <p>5 saying that at the end of the day every</p> <p>6 individual -- every third-party payer that</p> <p>7 comes and negotiates with every physician</p> <p>8 that is administering physician-</p> <p>9 administered drugs has a different</p> <p>10 reimbursement contract with different</p> <p>11 percentages off of AWP? That there is for</p> <p>12 every -- for every unique agreement</p> <p>13 between an insurer and a physician or an</p> <p>14 oncology group, there is a different</p> <p>15 resulting set of terms?</p> <p>16 Q. What I am asking you is whether --</p> <p>17 MR. EDWARDS: Strike that.</p> <p>18 Q. What I am asking you is whether in</p> <p>19 connection with each individual</p> <p>20 negotiation there is a negotiation over</p> <p>21 the price of the drug, there is a</p> <p>22 negotiation over the price of the service,</p>	<p style="text-align: right;">544</p> <p>1 that are standard, and so the uniqueness</p> <p>2 is lost very quickly in the standard</p> <p>3 practices and procedures of what is</p> <p>4 articulated in these contracts.</p> <p>5 Q. How can you say that when you have never</p> <p>6 reviewed any contracts between PBMs and</p> <p>7 payers and you have never reviewed any</p> <p>8 contracts between physicians and payers?</p> <p>9 MR. SOBOL: Objection to the</p> <p>10 form.</p> <p>11 You may answer.</p> <p>12 A. I can say that by having reviewed -- by</p> <p>13 looking at the proforma contracts that you</p> <p>14 have put in front of me, where there is a</p> <p>15 blank in front of the AWP less blank</p> <p>16 percent, and then looking at data that</p> <p>17 summarize at the end of the day what that</p> <p>18 percent is, and that tells me that it is</p> <p>19 13 to 17 percent for single source drugs.</p> <p>20 I can -- I can say that because</p> <p>21 across a variety of industries there are</p> <p>22 -- there are standards -- every</p>
<p style="text-align: right;">543</p> <p>1 there is a negotiation over other terms,</p> <p>2 there is a negotiation over the trade-offs</p> <p>3 among all of those variables, and it is</p> <p>4 difficult to predict in advance how any</p> <p>5 particular negotiation is going to turn</p> <p>6 out? It depends on the facts and</p> <p>7 circumstances?</p> <p>8 A. I would say that the type of uniqueness</p> <p>9 you are talking about is also</p> <p>10 characteristic of negotiations between</p> <p>11 third-party payers and PBMs and -- and an</p> <p>12 important "and," spelled capital A,</p> <p>13 capital N, capital D -- that uniqueness is</p> <p>14 bound very narrowly, within very</p> <p>15 closely-set parameters, that lead to</p> <p>16 results such that the final negotiations</p> <p>17 of AWP less a percent ranges from 13 to</p> <p>18 17 percent, and although you have a</p> <p>19 different individual wearing a different</p> <p>20 suit on a given day and driven by unique</p> <p>21 factors, there are a set of proforma</p> <p>22 channels in which these negotiations run</p>	<p style="text-align: right;">545</p> <p>1 negotiation is, quote, unique, unquote,</p> <p>2 but there are various ranges in which</p> <p>3 salaries are negotiated or prices are</p> <p>4 negotiated if information is fully under</p> <p>5 -- is understood or is thought to be</p> <p>6 understood, given the set of information</p> <p>7 that is there, such that the results are</p> <p>8 predictable.</p> <p>9 Q. So the validity of your opinion depends on</p> <p>10 the extent to which it is appropriate to</p> <p>11 focus on only one factor or one variable</p> <p>12 contained in the contract, i.e. the price</p> <p>13 for the drug and whether it is a</p> <p>14 percentage off of AWP, and you would</p> <p>15 ignore the other factors?</p> <p>16 MR. SOBOL: Objection.</p> <p>17 A. I would not ignore the other factors, and</p> <p>18 I think in response to one of the</p> <p>19 questions, I discussed those factors and</p> <p>20 what the charges were by different type of</p> <p>21 service, and one would observe those, and</p> <p>22 I have observed those, and I have -- and</p>

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58 (Pages 546 to 549)

<p style="text-align: right;">546</p> <p>1 observations will be made to the extent 2 that they vary with the negotiation off of 3 AWP, but I have seen nothing -- I have 4 seen no evidence to date indicating to me 5 that that is a determining factor in that 6 negotiation. 7 (Mr. Mayte exiting the 8 deposition room at 3:44 p.m.) 9 BY MR. EDWARDS: 10 Q. Have you ever seen the supplemental 11 Dyckman study? 12 A. I don't think so. 13 MR. EDWARDS: Let's mark as 14 Exhibit 19 a copy of a document entitled 15 Health Plan Payment for Physician- 16 Administered Drugs, Dyckman & Associates, 17 August 2003, No. 3-5. 18 (Health Plan Payment for 19 Physician-Administered Drugs, 20 Dyckman & Associates, August 21 2003, No. 3-5 marked 22 Exhibit Hartman 019 for</p>	<p style="text-align: right;">548</p> <p>1 THE WITNESS: So they are both 2 dated the same date. 3 (Survey of Health Plans 4 Concerning Physician Fees and 5 Payment Methodology dated 6 August 2003, No. 3-7 marked 7 Exhibit Hartman 020 for 8 identification.) 9 (Handing Hartman Exhibit 10 No. 020 to the witness.) 11 A. Because the table I am looking at looks 12 awfully damn similar to the one that I 13 have seen in the original Dyckman. 14 (Pause.) 15 (The witness viewing Hartman 16 Exhibit No. 020.) 17 A. Okay. I'm -- what I have found and why I 18 asked to see the original is that 19 certainly what I had referred to in the 20 original report, which I think is probably 21 Exhibit 13 -- 22 (Pause.)</p>
<p style="text-align: right;">547</p> <p>1 identification.) 2 BY MR. EDWARDS: 3 Q. Have you ever seen this document before? 4 (Pause.) 5 (The witness viewing Hartman 6 Exhibit No. 019.) 7 Q. My question to you, sir, was simple. Have 8 you ever seen this before? 9 A. I was so interested in reading it, I am 10 sorry, I got lost. 11 I'm not sure. Can I see the 12 original? 13 Q. Do you mean the Dyckman report that you 14 rely on? 15 A. Yes. 16 Q. Okay. 17 MR. EDWARDS: Why don't we mark 18 this as Exhibit 20. For the record, this 19 is a report entitled Survey of Health 20 Plans Concerning Physician Fees and 21 Payment Methodology dated August 2003, 22 No. 3-7.</p>	<p style="text-align: right;">549</p> <p>1 (The witness viewing Hartman 2 Exhibit No. 013.) 3 A. Well, it is mentioned in the Med. PAC 4 report. 5 In any case, my recollection of 6 what I relied on in Med. PAC is page 17 of 7 the study numbered -- well, the study 8 dated the same month, same year, number 9 03-7, Exhibit 13, which shows distribution 10 of health plans distributed by drug 11 pricing by AWP formula, and that is the 12 set of numbers that I remember occurring 13 -- appearing in the Med. PAC report, and 14 in the document you just gave me, I am 15 seeing that same table as Exhibit 2, but 16 so -- 17 Q. That's on page? 18 A. Page 3 of Exhibit -- 19 Q. 19? 20 A. -- 19. 21 Q. Why don't you take a look at page 4 of 22 Exhibit 19.</p>

<p style="text-align: right;">550</p> <p>1 (Witness complying.)</p> <p>2 A. Okay. And now what?</p> <p>3 Q. There is a section headed "Characteristics</p> <p>4 of Payment Systems for Drugs and</p> <p>5 Administration fees," and it states,</p> <p>6 "There are several patterns and trends</p> <p>7 regarding payment system characteristics</p> <p>8 that can be inferred from the health plan</p> <p>9 survey responses," and the first bullet</p> <p>10 is, quote, "There is a general</p> <p>11 understanding among health plans that</p> <p>12 physicians purchase drugs at prices that</p> <p>13 are below 95 percent of AWP, and given</p> <p>14 that health plan prices are generally at</p> <p>15 or above this rate, the sale of drugs is a</p> <p>16 profit center for physicians," close</p> <p>17 quote.</p> <p>18 Did you consider that in</p> <p>19 developing the opinions you developed in</p> <p>20 your report with respect to the impact of</p> <p>21 the alleged scheme on reimbursement rates</p> <p>22 for physician-administered drugs in the</p>	<p style="text-align: right;">552</p> <p>1 What this is saying is everyone</p> <p>2 knows that ASP is lower than AWP, and that</p> <p>3 is what all my yardsticks show, again</p> <p>4 except for the regulation -- as written by</p> <p>5 regulation. The issue here is how much</p> <p>6 below it is.</p> <p>7 And, yes, it is below, but I see</p> <p>8 nothing here that indicates that there is</p> <p>9 any understanding of how much below it is,</p> <p>10 that is the levels of spreads of three to</p> <p>11 four hundred percent that we saw in</p> <p>12 Lupron, and it was only at that point that</p> <p>13 when that information became available</p> <p>14 that the government got exercised and</p> <p>15 persons got exercised.</p> <p>16 So this is perfectly consistent</p> <p>17 with what I have put forward, and this is</p> <p>18 not enough information to know how badly</p> <p>19 below, how far below AWP ASP is, the</p> <p>20 actual acquisition cost, how much of a</p> <p>21 profit center that is for those third-</p> <p>22 party payers to start to take the</p>
<p style="text-align: right;">551</p> <p>1 private sector?</p> <p>2 A. Yes.</p> <p>3 Q. So this may be a situation similar to the</p> <p>4 one we discussed in attachment C where you</p> <p>5 talked about whether if spreads were</p> <p>6 understood to exist, competitors would be</p> <p>7 in a position to behave to eliminate them?</p> <p>8 MR. SOBOL: Objection.</p> <p>9 Q. Is that correct?</p> <p>10 MR. SOBOL: Objection.</p> <p>11 A. No. The -- what this is saying and given</p> <p>12 the fact that WAC is below AWP, this is</p> <p>13 saying for all drugs by formula, so what</p> <p>14 does this say? It says, "There is a</p> <p>15 general understanding among health plans</p> <p>16 that physicians purchase drugs at prices</p> <p>17 that are below 95 percent of AWP," and it</p> <p>18 is under the yardsticks that I have used</p> <p>19 in everything but for Medicare. The</p> <p>20 yardsticks are such that it is understood</p> <p>21 that ASP is more than five percent below</p> <p>22 AWP.</p>	<p style="text-align: right;">553</p> <p>1 competitive actions that have since</p> <p>2 started to occur say with Lupron, when</p> <p>3 that understanding was much -- made much</p> <p>4 clearer than kind of the general</p> <p>5 understanding that they are below</p> <p>6 95 percent of AWP.</p> <p>7 Q. And this is not enough information to</p> <p>8 enable you to determine the extent to</p> <p>9 which third-party payers understood the</p> <p>10 extent of the spread between ASP and AWP?</p> <p>11 Correct?</p> <p>12 A. Certainly not.</p> <p>13 Q. You would have to make further inquiry in</p> <p>14 order to determine that? Correct?</p> <p>15 A. Well, the inquiry I would have to make is</p> <p>16 what I have laid out in my declaration.</p> <p>17 Q. In the last bullet on this page, it</p> <p>18 states, quote, "Approximately half of the</p> <p>19 health plans planning to reduce drug</p> <p>20 prices will consider raising fees for drug</p> <p>21 administration codes."</p> <p>22 What do you understand that to</p>

60 (Pages 554 to 557)

<p style="text-align: right;">554</p> <p>1 mean?</p> <p>2 A. I understand that to mean that as of</p> <p>3 August 2003 and as of the state of</p> <p>4 understanding of pricing and expectations</p> <p>5 and a knowledge of occurrences in the</p> <p>6 industry, that at that time when this</p> <p>7 survey was done approximately half of the</p> <p>8 health plans were planning to reduce</p> <p>9 prices or who are planning to reduce</p> <p>10 prices will consider raising fees for drug</p> <p>11 administration codes.</p> <p>12 Q. So does this suggest to you that there is</p> <p>13 a connection between the price of the drug</p> <p>14 and the price of the service with respect</p> <p>15 to physician-administered drugs in the</p> <p>16 private sector?</p> <p>17 MR. SOBOL: Objection to the</p> <p>18 form.</p> <p>19 You may answer.</p> <p>20 A. Well, on the face of it what it says to me</p> <p>21 is that at the end of 2003, about a year</p> <p>22 ago, only half of the plans, not all of</p>	<p style="text-align: right;">556</p> <p>1 world worked during the class period.</p> <p>2 Q. Don't you have to consider the</p> <p>3 relationship between the cost of the drug</p> <p>4 and the cost of the service in determining</p> <p>5 whether there has been an impact --</p> <p>6 MR. SOBOL: Objection.</p> <p>7 Q. -- from the alleged scheme?</p> <p>8 MR. SOBOL: Objection.</p> <p>9 A. No.</p> <p>10 Q. Let's assume that in the actual world a</p> <p>11 payer pays \$10 for the drug and \$10 for</p> <p>12 the service, and then in the but-for world</p> <p>13 the payer pays \$5 for the drug and \$15 for</p> <p>14 the service. Has that payer been injured?</p> <p>15 MR. SOBOL: Objection.</p> <p>16 A. You -- you have asked me a different</p> <p>17 question. Your last question was did that</p> <p>18 change my opinion or have any influence on</p> <p>19 my opinion about impact. Now you have</p> <p>20 just asked a question about injury.</p> <p>21 Which do you -- which one are</p> <p>22 you asking me to answer?</p>
<p style="text-align: right;">555</p> <p>1 the plans, will consider, having done so,</p> <p>2 doing something about changing their drug</p> <p>3 prices and their fees, and they may link</p> <p>4 them, or how they are going to do that, it</p> <p>5 is not particularly clear. I am seeing</p> <p>6 that there is an understanding by this</p> <p>7 survey based on what was known in the</p> <p>8 market at that time that there was a</p> <p>9 necessity to do something about drug</p> <p>10 pricing and how they were reimbursing for</p> <p>11 drugs, and at the same time they were</p> <p>12 going to do that, there is a consideration</p> <p>13 of raising fees, and I -- there is not</p> <p>14 enough here for me to learn whether they</p> <p>15 are tied or how they are trading that off</p> <p>16 or what that means; and, secondly, this is</p> <p>17 going from -- you know, they are talking</p> <p>18 about doing this in -- they will consider</p> <p>19 it in 2003. Whether they are doing that</p> <p>20 now in 2004, we're at the end of the class</p> <p>21 period. I -- this -- I am not seeing as a</p> <p>22 characterization of so far of how the</p>	<p style="text-align: right;">557</p> <p>1 Q. I am asking you to answer my last</p> <p>2 question.</p> <p>3 A. Okay. So we're not talking about impact</p> <p>4 now. You are asking me a question about</p> <p>5 injury. And in that context, could you</p> <p>6 repeat the question, or can I have it read</p> <p>7 back?</p> <p>8 MR. EDWARDS: Go ahead and read</p> <p>9 it back.</p> <p>10 (The reporter then read back as</p> <p>11 follows:</p> <p>12 "Question: Let's assume that in</p> <p>13 the actual world a payer pays \$10 for the</p> <p>14 drug and \$10 for the service, and then in</p> <p>15 the but-for world the payer pays \$5 for</p> <p>16 the drug and \$15 for the service. Has</p> <p>17 that payer been injured?")</p> <p>18 MR. SOBOL: Same objection.</p> <p>19 A. Without a broader context, I -- the</p> <p>20 hypothetical is too -- too stark for me to</p> <p>21 feel that it fits the facts. I mean you</p> <p>22 are --</p>

<p style="text-align: right;">558</p> <p>1 Q. What broader context would you need?</p> <p>2 A. The -- the -- you have posited a situation</p> <p>3 where the drug cost is the same as the</p> <p>4 physician services. You have -- I would</p> <p>5 need to know whether the, as I look at</p> <p>6 the, as I say, the contracts for the PBMs</p> <p>7 and their clients, drug costs relative to</p> <p>8 the other services are much smaller, and</p> <p>9 whether that would influence those line-</p> <p>10 by-line costs, the -- whether they are</p> <p>11 related would depend on that. You are</p> <p>12 asking me about now a relationship in a</p> <p>13 particular context where it is \$10, \$10.</p> <p>14 It's the same.</p> <p>15 I will answer as follows: that</p> <p>16 what I have been asked to do is examine</p> <p>17 the impact of what the -- specifically the</p> <p>18 AWP inflation scheme, what that impact and</p> <p>19 injury and -- injury and damages, what the</p> <p>20 impact was, and what the injury and</p> <p>21 damages were, and I am focusing on that</p> <p>22 specifically.</p>	<p style="text-align: right;">560</p> <p>1 A. Well, the -- what I say there is that</p> <p>2 Medicare reimbursement for all</p> <p>3 Part B-covered drugs was set at the lesser</p> <p>4 of the estimated acquisition cost, which I</p> <p>5 have seen described separately as the</p> <p>6 average acquisition cost, or -- and if</p> <p>7 we're talking about an average acquisition</p> <p>8 cost, averaged over a large number of</p> <p>9 acquirers, that is going to be equal to</p> <p>10 the average price at which it was sold to</p> <p>11 those broad number of acquirers at the</p> <p>12 average cost at which they acquired it.</p> <p>13 So that the supply and demand curve will</p> <p>14 intersect, and that the average</p> <p>15 acquisition cost will equal the average</p> <p>16 sale price.</p> <p>17 Oh, I am sorry. And you are</p> <p>18 saying or the --</p> <p>19 I am taking the average</p> <p>20 acquisition cost as equal to the average</p> <p>21 sale price, and then the continuation of</p> <p>22 the sentence -- I now see the confusion on</p>
<p style="text-align: right;">559</p> <p>1 Q. Now I want to talk to physician-</p> <p>2 administered Part B. As I understand it</p> <p>3 with respect to Part B drugs, your but-for</p> <p>4 spread is zero. Is that correct?</p> <p>5 A. That is correct.</p> <p>6 Q. And you say that that is by regulation?</p> <p>7 Is that correct?</p> <p>8 A. That is as a matter of my interpretation</p> <p>9 of the regulations.</p> <p>10 Q. You are not an expert on Medicare</p> <p>11 regulations? Correct?</p> <p>12 A. I am not an expert on statutory</p> <p>13 complexities of Medicare regulations.</p> <p>14 Q. You don't have a law degree? Is that</p> <p>15 correct?</p> <p>16 A. No.</p> <p>17 Q. And in footnote 48 where you explain this</p> <p>18 -- that is footnote 48 on page 22 -- you</p> <p>19 seem to be saying that AWP should equal</p> <p>20 ASP because the regulations set</p> <p>21 reimbursement at the lesser of AWP or EAC.</p> <p>22 Is that right?</p>	<p style="text-align: right;">561</p> <p>1 your face -- is "or the national average</p> <p>2 wholesale price."</p> <p>3 Should I reanswer that question?</p> <p>4 Q. That would be fine, because you have</p> <p>5 completely lost me.</p> <p>6 MR. SOBOL: Not bad. You made</p> <p>7 it after four o'clock on day 2 until that</p> <p>8 happened.</p> <p>9 (Laughter.)</p> <p>10 MR. SOBOL: We could read back</p> <p>11 your answer, if you want.</p> <p>12 THE WITNESS: Actually the</p> <p>13 answer is irrelevant. Why don't you read</p> <p>14 back the question.</p> <p>15 BY MR. EDWARDS:</p> <p>16 Q. I am trying to understand your basis for</p> <p>17 opining that the but-for spread under</p> <p>18 Medicare Part B should be zero.</p> <p>19 A. That's what I was getting at. I just was</p> <p>20 getting ahead of myself.</p> <p>21 Essentially as I read the</p> <p>22 regulations, I read the regulations that</p>

62 (Pages 562 to 565)

<p style="text-align: right;">562</p> <p>1 under Medicare Part B from the period of</p> <p>2 1992 through 1997 that Medicare Part B</p> <p>3 would reimburse at the lesser of the</p> <p>4 estimated acquisition cost, which I take</p> <p>5 as equal to the average acquisition cost,</p> <p>6 or the alternative is the national average</p> <p>7 wholesale price, whichever is -- well, the</p> <p>8 lesser of.</p> <p>9 That later changed to 95 percent</p> <p>10 of AWP, and then when relevant, changed to</p> <p>11 the AWP of the least costly alternative as</p> <p>12 the other possible price that it was</p> <p>13 lesser of: estimated acquisition cost or</p> <p>14 any of those alternatives.</p> <p>15 And what I am saying is that</p> <p>16 throughout this period as a matter of</p> <p>17 economics an average acquisition cost for</p> <p>18 all purchases of a Medicare Part B is</p> <p>19 given by the average sale price of that</p> <p>20 NDC as it is sold, and so the -- the -- it</p> <p>21 -- if that is what the estimated</p> <p>22 acquisition cost should be, and it is my</p>	<p style="text-align: right;">564</p> <p>1 which it entered, and it was going to</p> <p>2 report the ASP.</p> <p>3 So I think -- I think people</p> <p>4 understood that the ASP and WAC were less</p> <p>5 than AWP, and why they wrote the</p> <p>6 regulations as they did I don't know, but</p> <p>7 I read the regulations, and if it is the</p> <p>8 estimated acquisition cost as what it is</p> <p>9 sold as, it is not sold -- they don't</p> <p>10 acquire it -- the physicians don't acquire</p> <p>11 it at AWP. They acquire it at an</p> <p>12 estimated acquisition cost.</p> <p>13 Q. Do you think the government lawyers who</p> <p>14 wrote the sentencing memo in the TAP case</p> <p>15 are an authoritative source for what</p> <p>16 government policy was when the regulations</p> <p>17 in question were adopted?</p> <p>18 A. I -- I have -- I have no ability to -- I</p> <p>19 have no idea what their expertise was or</p> <p>20 was not. I understand that there was an</p> <p>21 allegation of fraudulent behavior in</p> <p>22 marketing practices. I understand that</p>
<p style="text-align: right;">563</p> <p>1 opinion that that is what is meant, as is</p> <p>2 what is reflected actually in the</p> <p>3 sentencing memorandum and to what TAP has</p> <p>4 agreed to do -- that what they should have</p> <p>5 been charging and what the reimbursement</p> <p>6 rate should have been set at was ASP. So</p> <p>7 the markup above ASP was zero, and that is</p> <p>8 the but-for markup. In other words, the</p> <p>9 but-for AWP equals the ASP.</p> <p>10 Q. Doesn't the fact that the regulation</p> <p>11 distinguishes between AWP and EAC suggest</p> <p>12 that HCFA knew there was a difference</p> <p>13 between the two?</p> <p>14 MR. SOBOL: Objection.</p> <p>15 You may answer.</p> <p>16 A. I don't know what HCFA knew. I know what</p> <p>17 I read in the summaries of the regulations</p> <p>18 as I have read them. I have also read the</p> <p>19 portions of the sentencing memorandum</p> <p>20 saying what TAP said it was going to</p> <p>21 report going forward to accommodate its</p> <p>22 behavior to the sentencing memorandum into</p>	<p style="text-align: right;">565</p> <p>1 people pled guilty to them. I understand</p> <p>2 that a settlement amount of \$875 million</p> <p>3 was paid to the government. I understand</p> <p>4 that TAP admitted to certain practices and</p> <p>5 that they stopped those practices. And in</p> <p>6 responding to stopping those practices,</p> <p>7 they said that they would report their</p> <p>8 ASPs.</p> <p>9 Now that to me says whatever</p> <p>10 those lawyers knew, the interpretation was</p> <p>11 not dissimilar to what this seems to be</p> <p>12 saying, if that's what their -- if they</p> <p>13 are going to be reporting ASP and that's</p> <p>14 what they are going to be reimbursing at,</p> <p>15 that that was what was in the minds of</p> <p>16 those of the legislature or when these</p> <p>17 regulations were written, and I can only</p> <p>18 take them at face value and read what I am</p> <p>19 assuming the government is saying those</p> <p>20 reimbursement rates should be.</p> <p>21 MR. EDWARDS: I am going to mark</p> <p>22 as Exhibit 21 a copy of the government's</p>

<p style="text-align: right;">566</p> <p>1 memorandum regarding RTP as a kickback in 2 the United States v. MacKenzie case. 3 (Nine-page Government's 4 Memorandum Regarding RTP as a 5 Kickback Under Paragraph 55(b) 6 of the Conspiracy Charged in 7 Count I marked Exhibit Hartman 021 8 for identification.) 9 BY MR. EDWARDS: 10 Q. Have you heard of the McKenzie case? 11 A. Not to my knowledge. What is this dated? 12 Q. June 24, 2004. 13 A. I was out of town. 14 Q. Do you see it is signed by Michael Loucks? 15 A. I do. 16 Q. He is the same person that signed the 17 sentencing memo that you have been 18 referring to? 19 A. That's my recollection. 20 Q. And on the first page of this document, it 21 states, quote, "Every purchaser of Lupron 22 was able to obtain a list price for the</p>	<p style="text-align: right;">568</p> <p>1 following: first of all, the sentence 2 following the one that you asked me to 3 look at where the allegations made in 4 Lupron are laid out in that, those next 5 sentences and in the next paragraph were 6 certainly found to be the case and were 7 subject to the sentencing memorandum and 8 the plea agreement, and those are also 9 clearly the notion of marketing spread and 10 moving market share, the basis for the 11 allegations in this matter. 12 And finally, returning to the 13 sentence of interest, what I can say is 14 that I have observed summaries by the 15 government, by lawyers, and it is my 16 recollection by TAP where spreads were 17 listed, and the spreads and the return to 18 practice were expressed with the AWP 19 relative to the ASP, and it was clear as 20 day, and that's -- and that's what much of 21 the argument revolved around. 22 Now to the extent that</p>
<p style="text-align: right;">567</p> <p>1 drug which was lower than the average 2 wholesale price, AWP, and the spread 3 between list price and AWP was known to 4 the government in various ways and assumed 5 by the Medicare reimbursement system." 6 Now does that cause you to 7 reconsider your opinion that the but-for 8 AWP for Medicare Part B should be equal to 9 ASP? 10 MR. SOBOL: Well, may he be 11 permitted to read the sentence that 12 follows it? 13 MR. EDWARDS: He can read 14 anything he wants. 15 (Pause.) 16 (The witness viewing Hartman 17 Exhibit No. 021.) 18 A. The -- in what I have reviewed of the 19 sentencing memorandum and of the Complaint 20 in Lupron and the data of TAP's detailed 21 invoice and off invoice data and data from 22 oncology groups billing for Lupron was the</p>	<p style="text-align: right;">569</p> <p>1 Mr. Loucks is now coming back and saying 2 the spread between list price and AWP was 3 known to the government in various ways 4 and assumed by the Medicare system, I 5 don't know what to make of that. I know 6 that the RTP scheme was based on a 7 comparison between AWP and ASP, and I know 8 that the participants in the fraud and the 9 oncologists that pled guilty were billing 10 at AWP. And -- and that there was -- what 11 was the fundamental issue here was not 12 that there was -- that there was -- that 13 the list price was lower, but it is 14 exactly what is the next sentence: "That 15 it was neither assumed or known to the 16 government that it was that much lower," 17 and that's the source of the damages. 18 Q. What he is saying is that the but-for 19 spread, in your terminology, should be 20 25 percent; correct? 21 MR. SOBOL: Objection. 22 A. I see no number coming out of this spread.</p>

64 (Pages 570 to 573)

<p style="text-align: right;">570</p> <p>1 Q. Let me show you a number.</p> <p>2 MR. EDWARDS: We will mark as</p> <p>3 Exhibit 22 a copy of a transcript in</p> <p>4 U.S. v. MacKenzie for June 24, 2004.</p> <p>5 (Copy of transcript in United</p> <p>6 States versus Alan MacKenzie</p> <p>7 et al dated June 24, 2004</p> <p>8 marked Exhibit Hartman 022</p> <p>9 for identification.)</p> <p>10 BY MR. EDWARDS:</p> <p>11 Q. I want you to turn to page 68 of this</p> <p>12 transcript.</p> <p>13 (Witness complies.)</p> <p>14 Q. Beginning on line 4 --</p> <p>15 A. Prior to answering your question, if I</p> <p>16 might, who are the defendants in this</p> <p>17 matter? Who is Alan MacKenzie?</p> <p>18 Q. These were, as I understand it, TAP</p> <p>19 employees --</p> <p>20 A. Okay.</p> <p>21 Q. -- and others, but primarily TAP</p> <p>22 employees.</p>	<p style="text-align: right;">572</p> <p>1 after.</p> <p>2 (Pause.)</p> <p>3 (The witness viewing Hartman</p> <p>4 Exhibit No. 022.)</p> <p>5 (Ms. Halpern exiting the</p> <p>6 deposition room at 4:21 p.m.)</p> <p>7 A. Having read this, I can only conclude -- I</p> <p>8 conclude the following. Mr. Loucks is an</p> <p>9 attorney. He is talking -- he himself is</p> <p>10 talking about that essentially -- the</p> <p>11 estimated acquisition cost was taken to be</p> <p>12 five percent below AWP, and that his</p> <p>13 description of what was happening in the</p> <p>14 world I did not find confirmed by claims</p> <p>15 submitted by physicians to Medicare for</p> <p>16 Lupron and injections, and if indeed the</p> <p>17 regulations were not followed and</p> <p>18 estimated acquisition cost turned out to</p> <p>19 be 25 percent, and that was really what</p> <p>20 was being paid, well, then that should be</p> <p>21 the spread. But I have seen no evidence</p> <p>22 of that.</p>
<p style="text-align: right;">571</p> <p>1 A. Okay. And I am sorry. Which page did you</p> <p>2 direct me to?</p> <p>3 Q. I directed you to page 68, beginning at</p> <p>4 line 4, where Mr. Loucks says, "And the</p> <p>5 25 percent, everyone gets that. That's</p> <p>6 there. That is what Congress expected</p> <p>7 with AWP."</p> <p>8 Does that affect your opinion</p> <p>9 that the but-for spread for Medicare</p> <p>10 Part B should be zero by regulation?</p> <p>11 MR. SOBOL: Objection to the</p> <p>12 form.</p> <p>13 A. The -- my interpretation -- actually</p> <p>14 before I venture forth, let me just again</p> <p>15 read the --</p> <p>16 Q. Can't you just answer that yes or no? I</p> <p>17 don't need your interpretation. A yes or</p> <p>18 no answer would be just fine.</p> <p>19 A. In order for me to answer yes or no,</p> <p>20 counselor, I must read -- my</p> <p>21 interpretation, to give that yes or no, I</p> <p>22 want to read a few sentences prior and</p>	<p style="text-align: right;">573</p> <p>1 I see he is saying it is a</p> <p>2 historical fact not proven to this jury.</p> <p>3 It has not been proven to me either. And</p> <p>4 I don't think it has been -- I don't see</p> <p>5 it proven in the record here. And it</p> <p>6 certainly was not in oncology claims data</p> <p>7 that I have seen in the Lupron matter.</p> <p>8 Q. So you are not going to give me a yes or</p> <p>9 no answer to my question?</p> <p>10 A. (No audible response.)</p> <p>11 MR. SOBOL: Objection. Asked</p> <p>12 and answered.</p> <p>13 Q. Is it your opinion that estimated</p> <p>14 acquisition cost and average wholesale</p> <p>15 price as used in the Medicare</p> <p>16 reimbursement regulations mean the same</p> <p>17 thing?</p> <p>18 A. No. You said average wholesale price?</p> <p>19 Q. Yes.</p> <p>20 A. And estimated acquisition cost?</p> <p>21 Q. Yes.</p> <p>22 A. No.</p>

<p style="text-align: right;">574</p> <p>1 MR. EDWARDS: There are a couple</p> <p>2 of the other defendants, Tom, that want to</p> <p>3 ask some questions. I don't think they</p> <p>4 will be very long, but I will yield the</p> <p>5 floor to them at this point.</p> <p>6 MR. SOBOL: Rock on.</p> <p>7 THE WITNESS: Oh, God. There is</p> <p>8 more?</p> <p>9 (Laughter.)</p> <p>10 MR. KAUFMAN: I will be very</p> <p>11 quick.</p> <p>12 CROSS EXAMINATION</p> <p>13 BY MR. KAUFMAN:</p> <p>14 Q. So, Dr. Hartman, I want to give you a</p> <p>15 hypothetical and then just follow through</p> <p>16 on some of the consequences.</p> <p>17 A. Okay.</p> <p>18 Q. We have a WAC of 100 and an AWP of 125 and</p> <p>19 an ASP of 60.</p> <p>20 A. I am going to just write this down --</p> <p>21 Q. That is fine.</p> <p>22 A. -- so it will just help me out here. We</p>	<p style="text-align: right;">576</p> <p>1 A. Of those categories, I have made that</p> <p>2 clear in my declaration. Yes.</p> <p>3 Q. But it is that fact about your declaration</p> <p>4 I don't understand. The ASP -- let's say</p> <p>5 that this is sold to a wholesaler by a</p> <p>6 drug company. The WAC is the wholesaler</p> <p>7 list price. Correct?</p> <p>8 A. Correct.</p> <p>9 Q. And so what is said by WAC is this is the</p> <p>10 price we charge to wholesalers. Correct?</p> <p>11 A. That's correct.</p> <p>12 Q. And that's the price we charge to</p> <p>13 wholesalers no matter what the wholesalers</p> <p>14 later do? Right?</p> <p>15 MR. SOBOL: Objection.</p> <p>16 A. The wholesalers are usually constrained by</p> <p>17 the manufacturers who negotiate the</p> <p>18 ultimate prices, which they are made whole</p> <p>19 by the chargeback system. So the</p> <p>20 wholesalers are -- have very little</p> <p>21 strategic maneuvering room here. They are</p> <p>22 -- they are -- they are beaten up by the</p>
<p style="text-align: right;">575</p> <p>1 have the AWP of 125, a WAC of 100, and an</p> <p>2 ASP of -- what was it?</p> <p>3 Q. 60.</p> <p>4 A. Okay.</p> <p>5 Q. What is the but-for AWP?</p> <p>6 MR. SOBOL: Objection to the</p> <p>7 form of the question.</p> <p>8 MR. KAUFMAN: What is wrong with</p> <p>9 the form, Mr. Sobol?</p> <p>10 MR. SOBOL: It has insufficient</p> <p>11 information upon which he may be able to</p> <p>12 render an opinion.</p> <p>13 BY MR. EDWARDS:</p> <p>14 Q. You tell me if that is insufficient. You</p> <p>15 tell me whether you can give me the answer</p> <p>16 to this question or not.</p> <p>17 A. I have insufficient information. Is it a</p> <p>18 branded drug, single source, multisource,</p> <p>19 is it a physician injected, or is it a</p> <p>20 generic drug?</p> <p>21 Q. All of those factors would bear on the</p> <p>22 answer to that question? Is that so?</p>	<p style="text-align: right;">577</p> <p>1 manufacturers in terms of pricing and what</p> <p>2 they can do, but.</p> <p>3 Q. And all of that reflects or is reflected</p> <p>4 in ASP? Correct?</p> <p>5 MR. SOBOL: Objection.</p> <p>6 A. All of what is reflected in ASP?</p> <p>7 Q. ASP is net of all factors affecting the</p> <p>8 price at which the drug is sold? Correct?</p> <p>9 A. ASP is -- you would take -- I might bill</p> <p>10 out a drug and get a gross invoice amount</p> <p>11 that is not necessarily related to AWP or</p> <p>12 WAC. WAC is merely what I sell -- that's</p> <p>13 what I sell it to and which the</p> <p>14 wholesalers take possession of that drug</p> <p>15 to turn around and resell it for me. And</p> <p>16 ASP is merely the gross amount that I</p> <p>17 receive plus all the payments that I</p> <p>18 make --</p> <p>19 Q. Right.</p> <p>20 A. -- to the various middlepersons along the</p> <p>21 way, including the wholesalers.</p> <p>22 If indeed the wholesalers sold</p>

66 (Pages 578 to 581)

<p style="text-align: right;">578</p> <p>1 it for less than WAC, I have to make them</p> <p>2 whole.</p> <p>3 Q. Right.</p> <p>4 A. So I have to pay them a chargeback. And</p> <p>5 then I offer discounts to, potentially to</p> <p>6 third-party payers, to PBMs. I offer</p> <p>7 discounts to retail chains, to docs.</p> <p>8 Q. And ASP is net of all that; correct?</p> <p>9 A. Correct.</p> <p>10 Q. Which is what I said in the first place.</p> <p>11 Right?</p> <p>12 MR. SOBOL: Objection.</p> <p>13 A. I'm not sure -- I agree with that. I</p> <p>14 don't know what you said in the first</p> <p>15 place.</p> <p>16 Q. ASP is the amount that is left in the drug</p> <p>17 company's pocket after all of that you</p> <p>18 have just described has occurred?</p> <p>19 A. That is certainly true.</p> <p>20 Q. Okay.</p> <p>21 A. It is what they are willing to sell their</p> <p>22 drug for, the unit revenue which they are</p>	<p style="text-align: right;">580</p> <p>1 A. Actually, a little bit before that, but</p> <p>2 close. The but-for AWP would be</p> <p>3 calculated by the difference between the</p> <p>4 spread implied by the numbers you just</p> <p>5 gave me, and that spread is 125 minus 60</p> <p>6 over 60.</p> <p>7 Q. Right. And that is a definite number?</p> <p>8 Correct?</p> <p>9 A. That is a definite number.</p> <p>10 Q. So you have that number. What other</p> <p>11 numbers would you need?</p> <p>12 A. I would need the -- and I would need the</p> <p>13 but-for spread, which would be, if this --</p> <p>14 this number is whatever it turns out to</p> <p>15 be, in excess of 100 percent.</p> <p>16 The but-for spreads, depending</p> <p>17 on which type of drug this would be, would</p> <p>18 be as illustrated by the information put</p> <p>19 forward so far among -- if it is a</p> <p>20 single-source branded drug, it would range</p> <p>21 from 16 to 33 percent.</p> <p>22 Q. But now a single-source branded drug is</p>
<p style="text-align: right;">579</p> <p>1 willing to sell their drug for given the</p> <p>2 strategic position of their drug.</p> <p>3 Q. And that is 60 in my hypothesis?</p> <p>4 A. Correct.</p> <p>5 Q. And the WAC in my hypothesis is 100?</p> <p>6 A. That's correct.</p> <p>7 Q. Okay. Now the but-for AWP you say cannot</p> <p>8 be determined from those numbers?</p> <p>9 A. You have given me a hypothetical, and</p> <p>10 according to this hypothetical, the spread</p> <p>11 would be greater than 100 percent.</p> <p>12 Q. Whatever it is, what is the but-for AWP in</p> <p>13 that hypothetical?</p> <p>14 MR. SOBOL: Objection.</p> <p>15 A. The but-for --</p> <p>16 MR. SOBOL: The same objection I</p> <p>17 had before.</p> <p>18 A. The but-for AWP, I would take that ASP,</p> <p>19 and without a calculator I am lost, so I</p> <p>20 will just show you the equations into</p> <p>21 which I would plug it.</p> <p>22 Q. On page 24 of your report?</p>	<p style="text-align: right;">581</p> <p>1 also sometimes administered by physicians?</p> <p>2 Correct?</p> <p>3 A. A single-source branded drug I'm taking as</p> <p>4 one that is not administered via</p> <p>5 physician. I am taking -- I am taking --</p> <p>6 I am looking -- I would -- I am going to</p> <p>7 break out by NDC those drugs that are not</p> <p>8 administered by physicians.</p> <p>9 Q. So those categories of drugs for which you</p> <p>10 calculate at this point preliminary</p> <p>11 spreads are all mutually exclusive?</p> <p>12 A. That's correct.</p> <p>13 Q. And collectively exhaustive?</p> <p>14 A. They will be.</p> <p>15 Q. But no drug falls into more than one of</p> <p>16 those categories?</p> <p>17 A. Are you talking about an NDC or a drug? I</p> <p>18 mean there are some NDCs that appear in</p> <p>19 oral form and some in injectable form, and</p> <p>20 some of those could be sold at retail or</p> <p>21 through PBMs, and some could be</p> <p>22 administered -- and there is one example</p>

<p style="text-align: right;">582</p> <p>1 in my table, and I think it is cytoxan, 2 where there is a powder for solution which 3 is -- which is a physician-administered 4 drug, and then there is also a tablet, and 5 there are quite distinct and different 6 actual spreads for those two drugs based 7 on this very preliminary use of the data, 8 and there are different yardsticks to 9 which I would compare them to. 10 Q. And the yardsticks you will ascertain by 11 looking at actual data to see the 12 difference in actual terms between the 13 listed AWP for the drug you are studying 14 and the sale price, the actual sale price 15 for that drug to that class of trade? 16 MR. SOBOL: Objection. 17 Q. Is that correct? 18 MR. SOBOL: Objection. 19 A. You asked about the yardsticks. Right? 20 Q. Yes. 21 A. The yardsticks, I am going to look -- I am 22 going to refine -- the yardsticks that</p>	<p style="text-align: right;">584</p> <p>1 generic drug. They have AWP's, but I don't 2 recall examining closely WACs for generic 3 drugs. 4 Q. So in the case of generic drugs that don't 5 have WACs, which may be all generic drugs 6 or just some, there is no manufacturer- 7 endorsed indication of a relationship 8 between wholesaler price and the price 9 charged to retailers by wholesalers? 10 Correct? 11 MR. SOBOL: Objection. 12 A. There is an endorsement of an AWP, and 13 that is primarily the endorsement that I 14 am most familiar with. 15 Q. Now in your but-for world, you keep 16 constant the relationship between AWP and 17 MAC for branded drugs -- not MAC, I am 18 sorry, WAC -- wrong consonant. Okay? You 19 do, don't you? 20 A. I don't keep it constant. The drug 21 companies do. 22 Q. And you do in your but-for world. That's</p>
<p style="text-align: right;">583</p> <p>1 have been reported to date focus on that 2 type of information for those different 3 categories, exclusive categories of drugs 4 in the past. I am going to refine it as 5 much as I can with actual data beyond that 6 survey data, if that is possible. I am 7 going to try and refine that with data for 8 non -- for drug manufacturers that are I 9 am informed were not subject to the 10 allegations, if such manufacturers exist. 11 And so whatever information that does 12 exist or additional survey information I 13 will use, plus whatever information I am 14 able to gather through the depositions I 15 have asked to be noticed I will use to 16 refine those yardsticks. 17 Q. Now in the case of generic drugs, some at 18 least have no WAC? Correct? 19 A. I am -- I would have to -- that would be 20 something that would be subject to 21 something I would have to check. I would 22 assume that WAC is less important for a</p>	<p style="text-align: right;">585</p> <p>1 what I said. In your but-for world, you 2 keep that same relationship? 3 A. In my but-for world, the ultimate price of 4 issue is AWP. 5 Q. Well, please. Do you keep constant in the 6 but-for world the relationship between AWP 7 and WAC? 8 A. If I -- if I need -- if it is needed -- 9 but, I will have to look at that, but -- 10 Q. That's a matter of arithmetic? That is a 11 consequence of the arithmetic you do or 12 not? 13 MR. SOBOL: Objection. 14 A. I have drawn no conclusion about whether 15 that arithmetic would stay the same 16 between AWP and WAC in the but-for world 17 or not. My assumption would be that it 18 would, but it is not something I have 19 needed for -- the reimbursement rates on 20 all the contracts we have looked at have 21 been related through AWP primarily -- 22 well, universally, what I have seen.</p>

68 (Pages 586 to 589)

<p style="text-align: right;">586</p> <p>1 So to the extent that I would</p> <p>2 need WAC, then I would have to turn to an</p> <p>3 assumption about the constancy of that</p> <p>4 relationship.</p> <p>5 Q. In the arithmetic you have done and</p> <p>6 exemplified in your report, the</p> <p>7 relationship between AWP and WAC in the</p> <p>8 real world is reflected in the</p> <p>9 relationship of AWP to WAC in the but-for</p> <p>10 world? Correct?</p> <p>11 A. That's correct.</p> <p>12 Q. Are you saying that just as statistical</p> <p>13 artifact?</p> <p>14 A. I am saying that as a matter of business</p> <p>15 practice. Drug manufacturers, since they</p> <p>16 started making use of the pricing</p> <p>17 compendia, have listed and made use of</p> <p>18 list prices that include a wholesale</p> <p>19 price, a wholesale list price in the case</p> <p>20 of BMS, or WAC in the case of other</p> <p>21 companies, and AWP, and they have</p> <p>22 maintained relationships between those</p>	<p style="text-align: right;">588</p> <p>1 relationship. The relationship -- the key</p> <p>2 relationship here, what is driving the</p> <p>3 alleged conspiracy, is AWP as the</p> <p>4 benchmark price. And, yes, there is an</p> <p>5 arithmetic relationship to WAC. But the</p> <p>6 key issue here is the signal of what AWP</p> <p>7 is for ASP.</p> <p>8 Now for a drug where WAC is</p> <p>9 20 percent below or 25 percent below, it</p> <p>10 is not going to matter to me. I am still</p> <p>11 going to be looking at what AWP is going</p> <p>12 to be relative to ASP and whether that AWP</p> <p>13 was a good signal for ASP.</p> <p>14 And so for different companies,</p> <p>15 they might have 20 percent or 25 percent.</p> <p>16 That is not relevant. I am looking at</p> <p>17 AWP. Since that -- since the third-party</p> <p>18 payers are reimbursing off AWP, I need to</p> <p>19 find out what the expectations, as Loucks</p> <p>20 says in the MacKenzie memorandum and</p> <p>21 brief, that people didn't know how much --</p> <p>22 how deep those discounts were. They</p>
<p style="text-align: right;">587</p> <p>1 prices, and sometimes they have changed</p> <p>2 slightly over time, but they have remained</p> <p>3 fairly uniformly constant by manufacturer,</p> <p>4 and that -- those facts exist.</p> <p>5 Q. And those are facts that you take into</p> <p>6 account in creating the but-for world?</p> <p>7 Correct?</p> <p>8 A. In terms of creating the but-for world,</p> <p>9 the fact that I take into account, that's</p> <p>10 a secondary fact.</p> <p>11 Q. But it turns out to be a fact in the</p> <p>12 but-for world that the relationship is</p> <p>13 maintained?</p> <p>14 A. For every drug that is -- that lists an</p> <p>15 AWP that is subject to the allegations in</p> <p>16 the conspiracy, it is irrelevant for the</p> <p>17 calculation of the injury and the damages</p> <p>18 what WAC is.</p> <p>19 Q. Nothing happens by accident in arithmetic?</p> <p>20 Will you give me that?</p> <p>21 A. Well, no. But what I am trying to say is</p> <p>22 that what we're getting at is there is a</p>	<p style="text-align: right;">589</p> <p>1 didn't know how far below AWP ASP really</p> <p>2 was. And that's the key relationship.</p> <p>3 And I am looking for yardsticks for</p> <p>4 AWP/ASP.</p> <p>5 Q. I have been here listening to you.</p> <p>6 A. Okay.</p> <p>7 Q. I am trying not to make you say what I</p> <p>8 have heard you say several times before.</p> <p>9 A. Then I am sorry. I am --</p> <p>10 Q. That is fine. I don't want to argue with</p> <p>11 you.</p> <p>12 Where there is a WAC as well as</p> <p>13 an AWP, there is a measurement that the</p> <p>14 audience can use to look at the difference</p> <p>15 between the two? Correct? It is just a</p> <p>16 matter of you can do arithmetic; right?</p> <p>17 A. Yes. If --</p> <p>18 Q. Where there is no WAC, that arithmetic</p> <p>19 comparison is not possible? Right?</p> <p>20 A. If -- if the Blue Book doesn't list WAC</p> <p>21 and it just lists an AWP, then you can</p> <p>22 either assume the math that you are</p>

<p style="text-align: right;">590</p> <p>1 talking about, or you would have to look</p> <p>2 for it, but --</p> <p>3 Q. Well, actually what you would assume is,</p> <p>4 and in fact what people do assume, is that</p> <p>5 there is no constant relationship between</p> <p>6 ASP and AWP for generic drugs? Correct?</p> <p>7 MR. SOBOL: Objection to the</p> <p>8 form.</p> <p>9 A. I'm not -- no.</p> <p>10 Q. How do you know?</p> <p>11 A. Well, I have already seen surveys from the</p> <p>12 OIG that have related --</p> <p>13 Q. No. Those relate reimbursement rates with</p> <p>14 ASP?</p> <p>15 A. No. They relate AWP to acquisition costs.</p> <p>16 Q. Yes. But any two numbers can be compared?</p> <p>17 A. Right.</p> <p>18 Q. Any two numbers? Right?</p> <p>19 A. Right.</p> <p>20 Q. In fact the proverbial spurious</p> <p>21 correlation is the standing of the</p> <p>22 St. Louis Cardinals and the price of rice</p>	<p style="text-align: right;">592</p> <p>1 there were expectations.</p> <p>2 Q. No, no, no. See, that's where I want --</p> <p>3 what I wanted to explore with you for as</p> <p>4 much time as I have remaining. Okay? I</p> <p>5 understand that you can do arithmetic,</p> <p>6 too, and you can look at the actual</p> <p>7 selling price for drugs, or the OIG can,</p> <p>8 anybody can. It is just arithmetic. The</p> <p>9 actual selling price, the reimbursement</p> <p>10 rate, AWP, people can compare numbers all</p> <p>11 over the place. I am now talking about</p> <p>12 subjective expectations. Expectation is</p> <p>13 not arithmetic. An expectation is a</p> <p>14 prediction about the future, a projection,</p> <p>15 in somebody's mind.</p> <p>16 And the question I am asking you</p> <p>17 is what reason you have to believe that</p> <p>18 anyone had in mind when negotiating the</p> <p>19 reimbursement rate for generics some view</p> <p>20 as to the relationship between AWP and</p> <p>21 ASP.</p> <p>22 A. Let me, if I might, turn your attention --</p>
<p style="text-align: right;">591</p> <p>1 in China; right? Those two numbers can be</p> <p>2 compared. Any two numbers can be</p> <p>3 compared.</p> <p>4 The question is whether anybody</p> <p>5 has expectations about the acquisition</p> <p>6 cost of a generic from the AWP.</p> <p>7 Now in the case of a branded</p> <p>8 drug, expectations could conceivably be</p> <p>9 generated by a comparison between two</p> <p>10 numbers, AWP/WAC. There is no possibility</p> <p>11 for that comparison in the case of</p> <p>12 generics? Correct?</p> <p>13 MR. SOBOL: Objection to the</p> <p>14 form.</p> <p>15 A. The -- there are possibilities for the</p> <p>16 generic to form expectations. There is</p> <p>17 information that informs such</p> <p>18 expectations. And there are documents</p> <p>19 that we have reviewed that have indicated</p> <p>20 how much ASP was below AWP that</p> <p>21 essentially said, my God, our expectations</p> <p>22 were so far off the radar charts. So</p>	<p style="text-align: right;">593</p> <p>1 I have got this thing all --</p> <p>2 (Pause.)</p> <p>3 (The witness viewing Hartman</p> <p>4 Exhibit No. 002.)</p> <p>5 A. I am going to just cite one of the</p> <p>6 documents, and I am sorry. When I put my</p> <p>7 declaration back together, I got it out of</p> <p>8 order.</p> <p>9 Footnote one, to attachment D,</p> <p>10 the meaning of average wholesale price and</p> <p>11 an analysis of industry reliance on it.</p> <p>12 And there is the article stated by --</p> <p>13 authored by Dawn Gencarelli,</p> <p>14 G-E-N-C-A-R-E-L-L-I, in an article</p> <p>15 entitled "Average wholesale price for</p> <p>16 prescription drugs: Is there a more</p> <p>17 appropriate pricing mechanism?" And she</p> <p>18 states, quote, "Though imperfect, the AWP</p> <p>19 has come to represent a starting point for</p> <p>20 determining prescription drug</p> <p>21 reimbursement for public and private</p> <p>22 payers. The AWP, or average wholesale</p>

70 (Pages 594 to 597)

<p style="text-align: right;">594</p> <p>1 price, of prescription drugs was intended</p> <p>2 to represent the average price at which</p> <p>3 wholesalers sell drugs to physicians,</p> <p>4 pharmacies, and other customers."</p> <p>5 And then she goes on to describe</p> <p>6 how that has changed.</p> <p>7 Q. Right.</p> <p>8 A. But what I am saying is that AWP for</p> <p>9 drugs, there is no distinction here</p> <p>10 between branded and generic. That was</p> <p>11 interpreted by the market over time</p> <p>12 starting with Medicare, statutory</p> <p>13 enablements, and the use of various</p> <p>14 pricing mechanisms and signals.</p> <p>15 AWP had a meaning for both</p> <p>16 branded and generic drugs, and it was</p> <p>17 taken to mean just what has been written</p> <p>18 -- what I read to you.</p> <p>19 Q. But you keep --</p> <p>20 A. And that has changed over time.</p> <p>21 (Mr. Wise exiting the deposition</p> <p>22 room at 4:45 p.m.)</p>	<p style="text-align: right;">596</p> <p>1 curious?</p> <p>2 MR. SOBOL: Objection to form.</p> <p>3 A. I don't think the yardsticks that we see</p> <p>4 reflect how drugs have been -- have been</p> <p>5 marketed, and in the past, and how the</p> <p>6 expectations of AWP reflected the whole</p> <p>7 array of prices below AWP in the 1980s,</p> <p>8 and once the allegation -- the alleged</p> <p>9 scheme began or was undertaken by</p> <p>10 defendants, one sees the spreads diverging</p> <p>11 differently for different types of drugs</p> <p>12 from the different yardsticks to begin</p> <p>13 with, and the divergence that I see in the</p> <p>14 actual spreads reflect exactly what I have</p> <p>15 described in attachment E, which is that</p> <p>16 the manufacturers would use this scheme,</p> <p>17 these price reductions, these price</p> <p>18 offsets, these incentive payments, to</p> <p>19 focus on particular groups that were able</p> <p>20 to move market share for their particular</p> <p>21 drugs. So if I am a big manufacturer of</p> <p>22 cytoxan and the docs are my main guys, and</p>
<p style="text-align: right;">595</p> <p>1 Q. I understand that somebody else had that</p> <p>2 opinion, and maybe that is your opinion,</p> <p>3 too. My question has to do with how you</p> <p>4 can discern what relationship was expected</p> <p>5 from actual arithmetic results. That is</p> <p>6 putting the cart before the horse. There</p> <p>7 is no way to know what was in somebody's</p> <p>8 mind by what they did, because as I think</p> <p>9 Mr. Edwards pointed out, you could have</p> <p>10 done the same thing for any number of</p> <p>11 reasons.</p> <p>12 The fact that they -- in fact,</p> <p>13 don't you think it is curious -- tell me</p> <p>14 this. Don't you think it is curious that</p> <p>15 the signal is different depending upon who</p> <p>16 is receiving it? That for one class of</p> <p>17 drugs people expect AWP to be so many</p> <p>18 percent higher than acquisition cost,</p> <p>19 whereas other people have a different</p> <p>20 expectation? The manufacturer is putting</p> <p>21 one AWP, but different people interpret it</p> <p>22 differently. You don't think that is</p>	<p style="text-align: right;">597</p> <p>1 I want to move market share of cytoxan</p> <p>2 overall, well, I will, and most of the</p> <p>3 NDCs are in injectable form or in</p> <p>4 physician- administered form, what the, as</p> <p>5 a matter of economics you would expect</p> <p>6 that the incentives would be channeled for</p> <p>7 most of the units of that drug sold, and</p> <p>8 the data is showing that the actual</p> <p>9 spreads indeed comport and corroborate the</p> <p>10 incentives that are the basis for the</p> <p>11 allegations.</p> <p>12 Q. See, I think this is where we are seeing</p> <p>13 things from two different points of view.</p> <p>14 If you were to do a study of the extent to</p> <p>15 which good bargainers --</p> <p>16 MR. SOBOL: I am sorry?</p> <p>17 Q. -- good bargainers, good bargainers,</p> <p>18 people who know how to negotiate, the</p> <p>19 extent to which they are able to negotiate</p> <p>20 discounts from MSRP, compared to people</p> <p>21 like me or Schleps, take your choice,</p> <p>22 there would be a difference. That</p>

598

1 difference is because of the difference in
2 the market power of the buyer, not because
3 of anything deceptive on the part of the
4 seller. Right?

5 A. No. Wrong.

6 Q. Wrong? It is my hypothetical? Can't I
7 make it up.

8 (Laughter.)

9 A. I didn't know you were making up a
10 hypothetical.

11 Q. What do you mean it is wrong?

12 A. I thought you were describing the world.

13 Q. I think it is the world. Certainly
14 there --

15 A. Okay. That's a big difference. You think
16 it is the world.

17 MR. SOBOL: One at a time.

18 Q. You give me a class. I am sure you can
19 find a class of buyer that has stronger
20 power than a given seller and stronger
21 than another class of buyer, and the
22 stronger class of buyer will prevail to a

599

1 greater extent over a seller than will the
2 weaker class of buyer. You will not infer
3 from that -- because I know you are a good
4 economist -- you will not infer from that
5 some difference or some scheme on the part
6 of the seller. It is in the power of the
7 buyer.

8 You don't know from looking at
9 the result whether the result is a matter
10 of the power of the buyer, the weakness of
11 the seller, the price of the rice in
12 China, the standing of the St. Louis
13 Cardinals? You don't know anything from
14 the result except that it is the result?
15 It is just arithmetic?

16 A. One needs not be -- one needs not be
17 hypothetical. One need not be
18 hypothetical to state that there will be
19 differential abilities of different
20 entities in negotiations and there will be
21 differential results related to discounts
22 paid that might be reflected for different

600

1 branded drugs of different therapeutic
2 capabilities. You have really got one
3 very good drug. And what I have done with
4 my yardsticks is I have looked to a period
5 that allows for the variations in
6 bargaining that you are talking about, and
7 allows for variations across maybe the
8 types of branded drugs, and leads to
9 yardsticks that differ by orders of
10 magnitude. These are -- these are orders
11 of magnitude of 100 percent.

12 Q. But you are attributing --

13 A. But let me finish.

14 Q. Okay.

15 A. You have --

16 Q. Yes. I have asked. So go ahead, please.

17 A. So I take account of the variations of the
18 sort you're pointing to that has been
19 revealed in the data that has purported to
20 measure what it is you are getting at, the
21 differences in the ability of people to
22 negotiate.

601

1 If we pull out one of those OIG
2 reports you are going to see AWP and you
3 are going to see acquisition of cost
4 across different types of pharmacies:
5 large ones, small ones, chains,
6 independents, rural, urban. All of them
7 have different negotiating power, and they
8 come up with spreads, and I have taken the
9 range of those spreads and put them into
10 the range of the yardsticks that I have
11 used, and to be conservative, I have used
12 the highest yardstick to give -- to give
13 the greatest benefit of the doubt on these
14 drugs. I haven't taken an average, and I
15 have taken -- I have taken the -- I have
16 assumed they are the worst guy bargaining
17 and they are subject to the highest
18 spread, and I have let them be the one --
19 the individual most screwed.

20 And then I have compared the
21 actual spreads that I observe in the
22 1990s, and by God, compared to the spreads

72 (Pages 602 to 605)

<p style="text-align: right;">602</p> <p>1 of the poorest Schlep here in terms of</p> <p>2 bargaining or some small rural drugstore</p> <p>3 in the OIG report that might be in -- what</p> <p>4 is the town in New Hampshire where they do</p> <p>5 the first vote? What notch is it? I</p> <p>6 don't think it's Pinkham Notch.</p> <p>7 Q. They are not to be belittled anyway.</p> <p>8 A. No. They are --</p> <p>9 Q. Anyway I have got your points. I have got</p> <p>10 your points. I do. I have been told by</p> <p>11 my trusted advisor that I should just let</p> <p>12 it lie. We will resume I think at some</p> <p>13 other occasion, I think, when I have more</p> <p>14 time.</p> <p>15 A. Okay. That would be delightful.</p> <p>16 CROSS EXAMINATION</p> <p>17 BY MR. CAVANAUGH:</p> <p>18 Q. Dr. Hartman, my name is Bill Cavanaugh. I</p> <p>19 represent Johnson & Johnson.</p> <p>20 Doctor, you gave some testimony</p> <p>21 today about the Cipro and Terazosin cases.</p> <p>22 Those are antitrust cases?</p>	<p style="text-align: right;">604</p> <p>1 slightly differently. That essentially it</p> <p>2 -- prices overall for both the generic and</p> <p>3 the branded drugs were maintained at</p> <p>4 supracompetitive levels by the fact that</p> <p>5 generic entry was postponed.</p> <p>6 Q. And the way you went about determining</p> <p>7 your but-for price in the absence of the</p> <p>8 alleged antitrust violation was by looking</p> <p>9 at pricing when the generics actually</p> <p>10 entered the market? Is that correct?</p> <p>11 A. I developed yardsticks in that case that</p> <p>12 looked as close to the market I was</p> <p>13 analyzing, whether it was the Terazosin</p> <p>14 launch in the year in which that took</p> <p>15 place and the type of drug that was, an</p> <p>16 antihypertensive, and I developed</p> <p>17 yardsticks and proposed yardsticks for</p> <p>18 Ciprofloxacin, and so yes. I developed</p> <p>19 yardsticks, different yardsticks depending</p> <p>20 on the facts of the drugs and when the</p> <p>21 entry would have taken place.</p> <p>22 Q. But the way you derived those yardsticks</p>
<p style="text-align: right;">603</p> <p>1 A. They are Hatch-Waxman matters. That is</p> <p>2 correct.</p> <p>3 Q. And am I correct that in those cases you</p> <p>4 opine that you could determine a but-for</p> <p>5 competitive price in the absence of the</p> <p>6 alleged antitrust violation?</p> <p>7 A. I have put forward declarations in support</p> <p>8 of class, and class has been certified,</p> <p>9 indicating that I could calculate but-for</p> <p>10 prices for the branded and the generic</p> <p>11 drugs absent the alleged violation, and I</p> <p>12 have implemented it for the Hytrin matter</p> <p>13 and the Terazosin matter.</p> <p>14 Q. And those cases involved a single product;</p> <p>15 correct? A single molecule?</p> <p>16 A. They did involve a single molecule.</p> <p>17 Q. The allegation in those cases, the alleged</p> <p>18 antitrust violation, was preventing the</p> <p>19 entry of a competitive generic into the</p> <p>20 market resulting allegedly in higher brand</p> <p>21 name prices? Is that a fair summary?</p> <p>22 A. I would -- I would -- I would summarize it</p>	<p style="text-align: right;">605</p> <p>1 was by looking at actual data based on</p> <p>2 when the generics came into the market?</p> <p>3 Correct?</p> <p>4 A. That's correct.</p> <p>5 Q. Let's turn to a different subject.</p> <p>6 What percentage of sales of</p> <p>7 brand name drugs to retail pharmacies do</p> <p>8 you believe are subject to chargeback</p> <p>9 arrangements?</p> <p>10 A. I may have -- I can't recall that number</p> <p>11 now. I have reviewed information like</p> <p>12 that, but I can't recall at this point.</p> <p>13 Q. Is it a fairly significant number?</p> <p>14 A. I really would be speculating.</p> <p>15 Q. Small? Large?</p> <p>16 A. You are asking me to speculate, and I</p> <p>17 don't do that.</p> <p>18 Q. All right. And just so we understand,</p> <p>19 when we refer to a chargeback arrangement,</p> <p>20 that is an arrangement where a</p> <p>21 manufacturer will distribute a drug</p> <p>22 through a wholesaler, but it has</p>

<p style="text-align: right;">606</p> <p>1 negotiated a price lower than what the</p> <p>2 wholesaler pays with the ultimate</p> <p>3 customer?</p> <p>4 A. That's correct.</p> <p>5 Q. Are you familiar with the brand names</p> <p>6 antitrust case?</p> <p>7 A. I am.</p> <p>8 Q. As a matter of fact, you were involved in</p> <p>9 that case assisting Professor Franks who</p> <p>10 was the expert for the wholesalers?</p> <p>11 Correct?</p> <p>12 A. That is correct.</p> <p>13 Q. And --</p> <p>14 A. I am trying to remember if it was for all</p> <p>15 of the wholesalers or a subset, but let's</p> <p>16 say a or the wholesalers.</p> <p>17 Q. Would you agree with me the essential</p> <p>18 premise in that case was that</p> <p>19 manufacturers and wholesalers had</p> <p>20 conspired not to give discounts to retail</p> <p>21 drugstores?</p> <p>22 MR. SOBOL: Objection to the</p>	<p style="text-align: right;">608</p> <p>1 reflect the relative bargaining power of</p> <p>2 each party?</p> <p>3 MR. SOBOL: Objection.</p> <p>4 You may answer.</p> <p>5 A. Are we talking about this market, or are</p> <p>6 we talking about any market?</p> <p>7 Q. In general. In general. In this case</p> <p>8 specifically, but just as a general</p> <p>9 principle.</p> <p>10 A. The -- one would have to take into account</p> <p>11 more than just relative size or relative</p> <p>12 bargaining. You would need to know how</p> <p>13 many buyers there were. You would need to</p> <p>14 know if there is 50 large buyers or one</p> <p>15 large buyer and 50 small buyers.</p> <p>16 Q. But whether there were 50 or one would all</p> <p>17 go to either one side or the other's</p> <p>18 relative bargaining power, wouldn't it?</p> <p>19 A. That's right. I mean you would need to</p> <p>20 understand -- I thought you were asking</p> <p>21 about a single -- a single buyer's. I</p> <p>22 mean you would need to know the context</p>
<p style="text-align: right;">607</p> <p>1 form.</p> <p>2 A. The premise and the allegations and the</p> <p>3 subtleties of the findings have receded</p> <p>4 sufficiently in my memory that, you know,</p> <p>5 I wouldn't even want to start framing or</p> <p>6 responding to that.</p> <p>7 The focus of the particular</p> <p>8 consulting I was doing was not looking so</p> <p>9 much at that as really focusing on the</p> <p>10 positions of the wholesalers and did they</p> <p>11 benefit from the conspiracy and what was</p> <p>12 their margins and --</p> <p>13 Q. In connection with your work in this case,</p> <p>14 did you ever go back and look at the</p> <p>15 allegations made in the brand name case</p> <p>16 and some of the pricing disparities that</p> <p>17 the retail drugstores pointed to?</p> <p>18 A. I have not reviewed the findings of that</p> <p>19 case in that regard. No.</p> <p>20 Q. Would you agree that the market clearing</p> <p>21 price of a product sold by a manufacturer</p> <p>22 to a particular buyer will ordinarily</p>	<p style="text-align: right;">609</p> <p>1 overall.</p> <p>2 Q. Sure. Because you would need to know how</p> <p>3 many other buyers are out there, and that</p> <p>4 would go to determining in any particular</p> <p>5 transaction how much bargaining power</p> <p>6 existed on one side or the other?</p> <p>7 Correct?</p> <p>8 A. That could possibly have an effect.</p> <p>9 Q. Would you agree with me that the average</p> <p>10 selling price of brand name drugs to</p> <p>11 hospitals reflect a balance of bargaining</p> <p>12 power between hospitals and manufacturers?</p> <p>13 MR. SOBOL: Objection to the</p> <p>14 form.</p> <p>15 A. I would expect that the rebates and the</p> <p>16 discounts that are offered to any group of</p> <p>17 purchasers if they have certain power or</p> <p>18 certain information over drugs would</p> <p>19 affect what those -- what those discounts</p> <p>20 are -- those price offsets would be from</p> <p>21 AWP.</p> <p>22 Q. So whether it is hospitals, doctors, PBMs,</p>

74 (Pages 610 to 613)

<p style="text-align: right;">610</p> <p>1 mail order pharmacies, if we looked at the</p> <p>2 average selling price for any one of those</p> <p>3 entities, that would be reflective of the</p> <p>4 balance of bargaining power between that</p> <p>5 entity and a manufacturer of a brand name</p> <p>6 drug?</p> <p>7 MR. SOBOL: Objection to the</p> <p>8 form.</p> <p>9 A. It would certainly give us some</p> <p>10 information.</p> <p>11 Q. Now in connection with your work in this</p> <p>12 case, have you looked at average selling</p> <p>13 prices by category of purchasers?</p> <p>14 A. At -- to -- to this point, that -- that</p> <p>15 analysis has been unnecessary.</p> <p>16 Q. So just so we're clear, you have not</p> <p>17 looked at the average selling price to</p> <p>18 retail pharmacies as compared to the</p> <p>19 average selling price to mail order</p> <p>20 pharmacies as compared to the average</p> <p>21 selling price to hospitals?</p> <p>22 A. I have some notion of and have looked at</p>	<p style="text-align: right;">612</p> <p>1 cytoxan?</p> <p>2 A. I have -- I am not at that stage yet. I</p> <p>3 have just done illustrative calculations.</p> <p>4 Q. Would it be fair that you have not</p> <p>5 systematically looked at average selling</p> <p>6 prices within a particular group of like</p> <p>7 buyers compared to other different groups</p> <p>8 of buyers --</p> <p>9 MR. SOBOL: Objection to the</p> <p>10 form.</p> <p>11 Q. -- such as hospitals compared to retail</p> <p>12 pharmacies compared to PBMs compared to</p> <p>13 mail order?</p> <p>14 MR. SOBOL: Objection to form.</p> <p>15 You may answer.</p> <p>16 A. I, to date, I have not been able to notice</p> <p>17 sufficiently complete 30(b)(6) depositions</p> <p>18 that I could fully calculate the average</p> <p>19 sale prices to those groups without more</p> <p>20 information from each of the defendants.</p> <p>21 Q. You raise an interesting subject. You</p> <p>22 have not calculated average selling prices</p>
<p style="text-align: right;">611</p> <p>1 that in the past, and the measure to which</p> <p>2 I am looking to now is the average of</p> <p>3 those averages.</p> <p>4 Q. But you have not determined particular</p> <p>5 average selling prices within a particular</p> <p>6 category of purchasers and compared those</p> <p>7 to other categories of purchasers?</p> <p>8 Correct?</p> <p>9 A. I have certainly looked at differential</p> <p>10 price offsets paid to different groups,</p> <p>11 which is the flip side of what you are</p> <p>12 getting at. So, for example, in cytoxan,</p> <p>13 because I am proceeding by NDC, and</p> <p>14 because I am looking at measures of</p> <p>15 spreads, the fact that I am seeing much</p> <p>16 different spreads to one group, i.e., the</p> <p>17 physicians, relative to those sold through</p> <p>18 PBMs, they are -- they are quite</p> <p>19 different, which tells me something about</p> <p>20 the price offsets and which tells me</p> <p>21 something about the relative ASPs.</p> <p>22 Q. Have you done it for drugs other than</p>	<p style="text-align: right;">613</p> <p>1 for my client Johnson & Johnson. Is that</p> <p>2 correct?</p> <p>3 MR. SOBOL: Objection.</p> <p>4 A. As of the writing of this declaration, I</p> <p>5 did -- I had received -- I would have to</p> <p>6 check precisely. I know I had received</p> <p>7 data from two defendants, and either there</p> <p>8 was some either contamination of the files</p> <p>9 or some missing data that made it</p> <p>10 impossible for me to do illustrative</p> <p>11 calculations for J & J and for GSK.</p> <p>12 Q. Did you attempt to do any for any Johnson</p> <p>13 & Johnson products?</p> <p>14 MR. SOBOL: Objection to the</p> <p>15 form. It assumes he had the data to do</p> <p>16 it.</p> <p>17 A. I asked my staff to take the data that we</p> <p>18 had received and take it to a point where</p> <p>19 I could do some comparisons similar to</p> <p>20 what has been put forward -- have been put</p> <p>21 forward in tables 2 and 3 in the</p> <p>22 declaration, and I was told that there was</p>

<p style="text-align: right;">614</p> <p>1 not sufficient data. I know we had AWP's.</p> <p>2 Q. I am sorry. That there was not what?</p> <p>3 A. There was not sufficient data that we</p> <p>4 could understand to accurately calculate</p> <p>5 all components, and since we had AWP's for</p> <p>6 a number of the drugs from the appendices</p> <p>7 to the Amended Master Complaint, my</p> <p>8 understanding was that we did not</p> <p>9 sufficiently understand the data to</p> <p>10 calculate reasonable ASP's, nor did we have</p> <p>11 AMP's that were reported to us.</p> <p>12 Q. Do you understand that there are a number</p> <p>13 of representative named class plaintiffs</p> <p>14 in this case?</p> <p>15 A. The -- oh, yes. I do.</p> <p>16 Q. Have you gone back and looked at their</p> <p>17 particular contracts with PBMs?</p> <p>18 A. I think I have seen contracts with ESI,</p> <p>19 but I'm not sure.</p> <p>20 Q. To your knowledge, have any of those named</p> <p>21 plaintiffs since they filed this lawsuit</p> <p>22 signed new agreements with any PBMs?</p>	<p style="text-align: right;">616</p> <p>1 context.</p> <p>2 In order for me to make sense of</p> <p>3 the response to that of -- if -- asking</p> <p>4 them to do that and what -- whether I</p> <p>5 would see them and then understand those</p> <p>6 contracts, I would need to be able to know</p> <p>7 whether the named plaintiffs had some idea</p> <p>8 not that they were just inflated but of</p> <p>9 the extent of the inflation that is being</p> <p>10 documented by the confidential information</p> <p>11 that I'm seeing, and that's not being</p> <p>12 released to them, so I have yet to</p> <p>13 ascertain with named plaintiffs how badly</p> <p>14 their expectations were off target,</p> <p>15 because I can't share that kind of</p> <p>16 information.</p> <p>17 Now if --</p> <p>18 Q. Didn't the Complaint in this case provide</p> <p>19 examples of what the plaintiffs contend</p> <p>20 are extraordinary inflations of AWP?</p> <p>21 A. Now that you have mentioned that, my</p> <p>22 recollection is that there are examples,</p>
<p style="text-align: right;">615</p> <p>1 A. I have no knowledge of that fact.</p> <p>2 Q. Now a named plaintiff in this case would</p> <p>3 certainly be aware of the allegation that</p> <p>4 there are inflated AWP's throughout the</p> <p>5 pharmaceutical industry? Correct?</p> <p>6 A. Certainly.</p> <p>7 Q. And if they are good business people, they</p> <p>8 would certainly take that into</p> <p>9 consideration in negotiating a new</p> <p>10 contract with the PBM, wouldn't they?</p> <p>11 A. I would expect they would try to to the</p> <p>12 best of their ability.</p> <p>13 Q. So have you asked your counsel to get you</p> <p>14 any new contracts that named class</p> <p>15 plaintiffs have signed with PBMs from</p> <p>16 after the period of time when the lawsuit</p> <p>17 was filed so you could compare them to</p> <p>18 what these contracts looked like before</p> <p>19 the lawsuit was filed?</p> <p>20 A. In order for me to --</p> <p>21 Q. I think you can answer that one yes or no.</p> <p>22 A. Well, I want to put -- put that in</p>	<p style="text-align: right;">617</p> <p>1 but that --</p> <p>2 Q. So wouldn't a knowledgeable and</p> <p>3 sophisticated --</p> <p>4 MR. SOBOL: Are you finished</p> <p>5 with your answer?</p> <p>6 THE WITNESS: I think so. Yes.</p> <p>7 Q. So wouldn't a sophisticated named</p> <p>8 plaintiff in this case, armed with that</p> <p>9 information, negotiate an entirely</p> <p>10 different PBM contract?</p> <p>11 A. It would depend upon how sophisticated the</p> <p>12 named plaintiff is. It would depend on</p> <p>13 the extent to which the drugs that were</p> <p>14 cited in the Complaint were drugs subject</p> <p>15 to those self-insured groups. It would</p> <p>16 depend upon a variety of things which</p> <p>17 would require some analysis on my part</p> <p>18 before drawing that -- a conclusion or</p> <p>19 conducting the analysis that you are</p> <p>20 asking me to do.</p> <p>21 Q. But just so we can agree on context, the</p> <p>22 context is you haven't asked for that</p>